

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA)	
)	Criminal No.: 3:00-CR-400-P
v.)	
)	Judge Jorge A. Solis
MARTIN NEWS AGENCY, INC.; and)	
BENNETT T. MARTIN,)	
)	FILED: April 30, 2001
Defendants.)	

RESPONSE OF THE UNITED STATES TO DEFENDANTS'
MOTION TO REQUEST PRELIMINARY HEARING ON THE
ADMISSIBILITY OF EVIDENCE OF OTHER CRIMES, WRONGS OR ACTS

I
INTRODUCTION

Defendants have filed a *Motion to Request Preliminary Hearing on the Admissibility of Evidence of Other Crimes, Wrongs or Acts* ("Motion") with this Court asking the Court to conduct a pretrial hearing on the admissibility of evidence the United States intends to introduce under Rule 404(b) of the Federal Rules of Evidence.

At this time, the United States does not intend to introduce any 404(b) evidence. If this changes, the United States will comply with its obligations under Rule 404(b). However, a pretrial hearing on the admissibility of 404(b) evidence is not required. Accordingly, the United States respectfully requests that this Court deny defendants' Motion.

II
THE ADMISSIBILITY OF 404(b) EVIDENCE

Defendants state in their Motion that Rule 104(a) of the Federal Rules of Evidence requires this Court determine whether evidence is admissible under Rule 404(b) before the

evidence is introduced to the jury. Furthermore, defendants request that this Court rule on the admissibility of 404(b) evidence before trial.

A. THE ADMISSIBILITY OF 404(B) EVIDENCE IS
DETERMINED UNDER UNITED STATES V. BEECHUM

The Fifth Circuit applies a two-step test in determining the admissibility of 404(b) evidence. United States v. Beechum, 582 F.2d 898, 911 (5th cir. 1978) (en banc). First, the extrinsic evidence must be relevant to an issue other than the defendant's character. Second, the evidence must satisfy Rule 403.

Other acts evidence is relevant "only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." Huddleston .v United States, 485 U.S. 681, 689 (1988). The Supreme Court has rejected the argument that the court must determine under Rule 104(a) that the defendant committed the other act before the jury is exposed to 404(b) evidence. Id. at 686. Therefore, defendants are mistaken to the extent they argue that this Court must make a preliminary finding that the other acts actually occurred prior to allowing the introduction of such evidence at trial. The relevancy of other acts evidence falls within Rule 104(b), under which the court considers all the evidence in the case and decides whether the jury could reasonably find by a preponderance of the evidence that the defendant committed the other act or wrong. Beechum at 912-13. This determination does not need to be made before the jury hears the evidence. United States v. Bermea, 30 F.3d 1539, 1562 (5th Cir. 1994). After the evidence is introduced, if the court determines that the jury could not reasonably find by a preponderance of the evidence that the defendant committed the extrinsic act, then the court must instruct the jury to disregard the evidence. Id. at 1562.

B. A PRETRIAL HEARING ON THE
 ADMISSIBILITY OF 404(B) EVIDENCE IS NOT REQUIRED

Defendants cite no cases indicating that a hearing on the admissibility of 404(b) evidence is required before the beginning of trial. In fact, case law indicates that the admissibility of 404(b) evidence should not be determined before trial. Beechum, 582 F.2d at 914-15. For example, the Beechum court stated that the probative value of the evidence depends significantly on the development of the case and the evidence presented at trial. Accordingly, the United States respectfully requests that this Court deny defendants' request for a determination prior to trial of the admissibility of 404(b) evidence.

III
CONCLUSION

Presently, the United States does not intend to introduce at trial other acts evidence under Rule 404(b). This makes the defendants' request for a pre-trial hearing moot. Further, because a pre-trial hearing on the admissibility of 404(b) evidence is not required, the United States requests that this Court deny defendants' Motion.

Respectfully Submitted,

SCOTT M. WATSON
Chief, Cleveland Field Office Ohio Bar Number--0042399

“/s/”
RICHARD T. HAMILTON, JR.

MICHAEL F. WOOD
District of Columbia Bar Number--376312

KIMBERLY A. SMITH
Ohio Bar Number--0069513

SARAH L. WAGNER
Texas Bar Number--24013700

Attorneys, Antitrust Division
U.S. Department of Justice
Plaza 9 Building, Suite 700
55 Erieview Plaza
Cleveland, OH 44114-1816
Telephone: (216) 522-4107
FAX: (216) 522-8332

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent via Federal Express to the Office of the Clerk of Court on this 27th day of April, 2001. In addition, copies of the above-captioned pleading were served upon the defendants via Federal Express on this 27th day of April 2001.

Richard Alan Anderson, Esq.
Burleson, Pate & Gibson, L.L.P.
2414 N. Akard, Suite 700
Dallas, TX 75201

Michael P. Gibson
Burleson, Pate & Gibson, L.L.P.
2414 N. Akard, Suite 700
Dallas, TX 75201

“/s/”
RICHARD T. HAMILTON, JR.